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In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES A. PINE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. App. A10-A11) is not reported. The opinion of the district court (Pet. App. A11-A28) is reported at 473 F. Supp. 349.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. The petition for a writ of certiorari was filed on August 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly declined to suppress recordings of telephone conversations that were intercepted under a state court but were used in a federal prosecution that was unrelated to the offense for which the court order had been issued.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 2 and 1341. Petitioner was sentenced to six-months' imprisonment to be followed by two years' probation. The court of appeals affirmed (Pet. App. A10-A11).

1. The evidence at trial showed that on April 9, 1977, co-defendant John Paul Daniel was involved in an accident with a construction company truck in Baltimore County, Maryland.[1] Later that same day Daniel telephoned petitioner, a lawyer with whom he was acquainted, to request that petitioner represent him in his personal injury claim (Pet. 4; Pet. App. A20). Petitioner instructed Daniel to go to the hospital and "[t]ell them you got whiplash, your back and neck are bothering you * * *." Petitioner stated that he had "a great doctor" who "writes good reports and nice permanency" and that "that's where the money's at." Petitioner further informed Daniel that "we'll get you on therapy three times a week for the next month or two," that we can get a "nice statement" on lost wages, that the amount of money involved "depends on how long we can keep you going to the doctor," and that Daniel would "pick [himself] up three or four thousand dollars * * * [he'll] definitely get at least two, three thousand to stick in [his] pocket, play money" (App. 72-

[1]Daniel pleaded guilty and testified as a government witness at petitioner's trial.

75).[2] Subsequently, petitioner instructed Daniel to get a false wage loss letter and to conceal his prior back problems from the physician to whom he was referred (*id.* at 79, 82-83, 88, 104-107, 113-114).[3]

Thereafter, petitioner notified the insurance company that insured the car driven by Daniel that a claim would be made under the personal injury protection provision of the policy and that Daniel was "experiencing medical problems" and "losing wages" (T. Tr. 33-34). Petitioner also mailed the company a letter purporting to be from Daniel's employer that stated that Daniel was to have reported for work on April 11, 1977, that his starting salary was to have been $350 per week, and that he did not report for work due to the accident (Government Exhibit 4D; T. Tr. 34-37). Petitioner also sent the insurance company a copy of a medical report that said that Daniel had never suffered a condition the same as or similar to the one about which he was now complaining (T. Tr. 39-40). In addition, petitioner pursued a third-party claim against the company that insured the construction company truck, and he mailed to this insurer documentation purporting to be from Daniel's employer

[2]"App." refers to the appendix that petitioner filed in the court of appeals; "S. Tr." refers to the transcript of the suppression hearing of January 30, 1978; and "T. Tr." refers to the trial transcript. Because the trial transcript and the government's trial exhibits were not available to us in time to prepare this Brief in Opposition, the citations herein to those sources are taken from the government's brief in the court of appeals.

[3]Approximately four and one-half years before the accident, Daniel had spinal meningitis and was hospitalized for a period of ten days; thereafter, on one occasion he had to use a cane to relieve the pressure in his back. Daniel also had previously obtained a workmen's compensation award for a back injury (T. Tr. 121-122).

concerning lost wages (Government Exhibit 5C; T. Tr. 64-65) and a medical report that gave no information concerning Daniel's prior back problems (T. Tr. 78).[4]

In June 1977, after petitioner learned that the case was being investigated, he told Daniel that he would no longer be able to handle the case, that he would refer Daniel to another lawyer, and that Daniel should "forget about any lost wages and a lost wage letter" (T. Tr. 133).

2. The government's evidence at trial included tape recordings of conversations between petitioner and Daniel that were recorded during electronic surveillance of Daniel's telephone conducted by local police pursuant to an order of a Maryland Circuit Court Judge. This surveillance had been authorized on March 30, 1977, to investigate the suspected involvement of Daniel and one Alphonso Mosca in an alleged conspiracy to sell illicit drugs, including cocaine, PCP, and marijuana (App. 12-19). In monitoring the wiretap on April 9, 1977, the police overheard Daniel's call to petitioner and learned of the accident and of petitioner's instructions to Daniel (*id.* at 72-75). The police listened to this conversation because of petitioner's reference at the beginning to Mosca, with whom petitioner indicated some familiarity, and because of their awareness of petitioner's association with one Michael Castiglione, a suspected drug dealer (S. Tr. 25, 18-19). After hearing the April 9 conversation, the police

[4]Representatives from the insurance companies testified that knowledge of petitioner's instruction to Daniel to conceal his prior back problems would have led them to believe that there was "something not right," that in order to determine the nature and extent of the claimed injuries "it is important to know if the individual had any prior injuries," and that such knowledge would have affected the manner in which the claim was handled (T. Tr. 43-44, 59, 78-80).

and the state's attorney met with the judge who had issued the interception order and gave him a transcript of the conversation. The judge agreed that the April 9 conversation was not protected by the attorney-client privilege, that it had been properly intercepted, and that the police in the future did not have to disregard conversations between petitioner and Daniel regarding the ongoing commission of a crime (App. 124-125, 129, 131, 137-138; S. Tr. 71-72, 96, 98, 104-105). Thereafter, between April 11 and April 21, 1977, the police intercepted six additional conversations on the monitored telephone between petitioner and Daniel relative to the accident (App. 76-86, 87-89, 90-105, 109-112). On the state's application under 18 U.S.C. 2517, the issuing judge on May 9, 1977, entered an order permitting the disclosure and use of these intercepted telephone conversations (App. 54-55).

ARGUMENT

1. Petitioner contends (Pet. 6-16) that the tape recordings of his telephone conversations with co-defendant Daniel, which concerned their unlawful mail fraud scheme and which were intercepted in the course of the electronic surveillance of Daniel's telephone authorized by the state court judge, should have been suppressed under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, because the criminal offense involved in those conversations differed from the offense for which the surveillance had been authorized.[5] The gravamen of

[5]Suppression is required under Title III only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States* v. *Giordano*, 416 U.S. 505, 527 (1974); *United States* v. *Donovan*, 429 U.S. 413, 433-434 (1977).

his contention is that, having discovered that Daniel and petitioner were apparently engaged in a scheme to defraud insurance companies, the officers should have procured a separate authorization to intercept conversations relating to that scheme, and that the oral approval of such interceptions by the state judge was constitutionally and statutorily invalid.[6] The district court, after conducting an evidentiary hearing, rejected this contention, and the court of appeals, in an unpublished order, affirmed on the basis of the district court's extensive opinion.

Whether or not the issue petitioner presents might, in the abstract, justify consideration by this Court, the facts of this case establish that his claim for suppression of his intercepted conversations is without merit. This is accordingly not a suitable case to undertake review of the legal issues presented by the petition.

Petitioner concedes (Pet. 6) that the conversation of April 9, in which he initiated the fraudulent scheme (see pages 2, 4 *supra*), was properly intercepted incidental to the wiretap relating to the narcotics offenses. In addition, the district court found, and petitioner does not dispute, "that the original [wiretap authorization] order in this case was lawfully obtained, in good faith, and was not a pretext" (Pet. App. A16) and that the police "clearly did not contemplate at the time they applied for the Daniel wiretap that it would uncover evidence of mail fraud" (*id.* at A27). The district court also determined, in a finding again not challenged by petitioner, that "there was reason to suspect that the communications [between petitioner

[6]We note that the wiretap statutes do not appear to authorize the use of electronic surveillance for the investigation of mail fraud or corresponding state offenses. See 18 U.S.C. 2516.

and Daniel] could have some relevance to the narcotics conspiracy" (*id.* at A19) and that the facts known to the police "raise[d] a reasonable suspicion [that petitioner was involved in the narcotics conspiracy] and justified [the] continued monitoring" (*id.* at A20).[7] Finally, the uncontested findings of the district court establish that "Daniel * * * and his alleged narcotics co-conspirators * * * often beg[an] their conversations with innocent remarks and utiliz[ed] code language * * * [which] made reasonable a more thorough monitoring" (*id.* at A19), that "[n]either the April 9 nor the succeeding communications began with any substantial amount of innocent, irrelevant conversation which should have caused a cessation of the monitoring" (*id.* at A20), and that there was "[t]he possibility [due to Daniel's "call-waiting" system for receiving an incoming call during the course of another telephone conversation] of an interven-ing, pertinent call going undetected by the agents [which] was exacerbated by the fact that over 50% of the narcotics related calls intercepted were of a duration of less than one minute" (*id.* at A23).

Based on the foregoing findings, the district court concluded (Pet. App. A23, A24):

> Thus, to properly execute the original wiretap order and effectively investigate the narcotics conspiracy, it was necessary for the police to listen to each of the * * * conversations [between petitioner and Daniel].
>
> * * * * *

[7]One of the monitoring agents was aware of petitioner's association with Michael Castiglione, a convicted narcotics dealer (S. Tr. 18, 19), and with Al Mosca, who was a subject of the wiretap investigation (S. Tr. 25).

> In sum, the * * * conversations [between petitioner and Daniel] would have been intercepted during the most restrictively minimized surveillance.[8]

Since the conversations thus could have been properly intercepted even had they turned out to be wholly innocuous, the fact that they related to a mail fraud scheme could make them no less subject to interception in the course of the narcotics investigation. In these circumstances, an objective assessment of the interceptions, see *Scott* v. *United States*, 436 U.S. 128 (1978), demonstrates that the monitoring and recording of the telephone conversations between petitioner and Daniel were fully proper.

Petitioner asserts (Pet. 9, 12, 16, 19), however, that the discussions between the police officers and the supervising judge, and the judge's agreement that the police should continue to monitor petitioner's conversations with Daniel if a crime was being committed, amounted in effect to an impermissible authorization for a new electronic surveillance. This assertion is belied by the record.[9] The testimony at the suppression hearing showed that the police advised the judge of the April 9 conversation between petitioner and Daniel because of the officers' concern about the possibility of a breach of the

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[8]The district court also found that the interception of the conversations between petitioner and Daniel did not violate the minimization requirements of 18 U.S.C. 2518(5) (Pet. App. A18) and that the police were "extremely diligent" in reporting to the issuing judge and keeping him apprised of developments in accordance with 18 U.S.C. 2518(6) (*id.* at A24).

[9]As discussed above, the record also contradicts petitioner's contention (Pet. 8) "that none of the subsequent * * * conversations [between petitioner and Daniel] would have been recorded unless [the issuing judge] had [orally] authorized such action."

attorney-client privilege. After hearing the recorded conversation and considering the applicable law, the judge advised the officers that the attorney-client privilege did not apply here because the conversation was in furtherance of a crime, and therefore that they could continue to monitor these conversations if a crime was being committed (App. 125, 129, 137-138).[10] Thus, the record does not support petitioner's assertion that there was an oral expansion of the existing wiretap authorization or an oral authorization for a new wiretap, in violation of 18 U.S.C. 2518.

Nor is petitioner correct in contending (Pet. 16) that, because of the judge's oral statements, the police officers "did not remain limited by the mandate" of the original authorization order. As discussed above, petitioner's conversations were monitored in accordance with the written interception order and not under the authority of an oral order. In this situation the district court was fully justified in concluding that the police officers did not act pursuant to a "general warrant. The police remain[ed] limited by the scope of the original warrant" (Pet. App. A27).

2. Petitioner also contends (Pet. 16-19) that the recordings should have been suppressed at his federal trial for mail fraud because state law, as it existed at the time of the wiretap,[11] would not have permitted such

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[10]The district court was correct in concluding that the attorney-client privilege did not protect these conversations, since that privilege is inapplicable to communications in furtherance of ongoing criminal activity. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F. 2d 899 (2d Cir. 1977).

[11]Md. Cts. & Jud. Proc. Code Ann. § 10-406 (1974) (Pet. App. A7), on which petitioner relies (Pet. 16-17), was repealed effective July 1, 1977. This statute limited the admissibility of a recorded interception to "a prosecution for the crime or crimes specified in the [authorization] order of court."

recordings to be used as evidence in a state criminal proceeding on state fraud charges. However, the district court correctly held that state law, where stricter than Title III, controls "the application, authorization and execution of a state [wiretap] order" but that federal law determines the admissibility of evidence in a federal trial (Pet. App. A25). This ruling was correct and does not conflict with the decisions in other circuits. See, *e.g.*, *United States* v. *Nelligan*, 573 F. 2d 251, 253-254 (5th Cir. 1978) ("[I]t is well settled that federal law governs the admissibility of tape recordings in federal criminal cases."). Relying on the decision in *United States* v. *Curreri*, 388 F. Supp. 607 (D. Md. 1974), the district court then determined that the prior state statute did not prohibit the type of interception at issue here but rather only precluded the admission of such interceptions in a state trial (Pet. App. A25). This interpretation of state law is consistent with the language of the statute and the interest of the state in prescribing the rules of admissibility for its own courts.[12] In any event, since petitioner's contention regarding a now-repealed Maryland statute has been rejected by two federal district judges sitting in Maryland, no further review of this issue is warranted.[13]

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[12]The courts in both this case and in *Curreri* have rejected petitioner's view (Pet. 17) of *State* v. *Siegel*, 13 Md. App. 444, 285 A. 2d 671 (1971), aff'd, 266 Md. 256, 292 A.2d 86 (1972). In any event, petitioner's argument (Pet. 17) that state law does not permit wiretaps for false pretense offenses is irrelevant to the issue concerning the use of interceptions that properly occurred during a narcotics investigation.

[13]Since no violation of any federal or state law occurred, there is no occasion to consider, as petitioner urges (Pet. 17-19), the applicability of the "silver platter" doctrine. See *Elkins* v. *United States*, 364 U.S. 206 (1960).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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